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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1905.

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JAMES H. McKENN

No. 1100

J. B. ORCUTT COMPANY, CHARLES DUNCAN, CHARLES H. DAUCHY COMPANY and CHARLES DUNCAN, Trustee, in the Matter of Ingalls Brothers, Bankrupts, Petitioners,

116

*vs.*

CHARLES H. GREEN and the FULLERTON-POWELL HARDWOOD LUMBER COMPANY, et al., Respondents.

## Brief for Respondent, Charles H. Green, in opposition to Motion for Writ of Certiorari.

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vs.

Charles H. Green and the Fullerton-Powell Hardwood Lumber Company, et al., Respondents.

## RESPONDENT'S POINTS.

### I.

THIS IS NOT A CASE WHERE THE WRIT OF CERTIORARI MAY BE GRANTED.

### II.

THIS MATTER IS NOT OF A CHARACTER OR IMPORTANCE WARRANTING THE INTERVENTION OF THIS COURT.

### III.

"PROVED" AS USED IN 57n CONTEMPLATES AND INCLUDES FILING.

### IV.

THE TRUSTEE HAS NO DUTY TO PERFORM IN RESPECT TO THE FILING OF CLAIMS.

# POINTS.

## I.

### This is not a case where the writ of certiorari may be granted.

The decision of the referee, affirmed by the Circuit Court of Appeals, Second Circuit, was in fact and in effect a disallowance of claims of the petitioners against the bankrupt estate, exceeding $2,000.00.

The reason for the disallowance was the failure of the petitioners to seasonably file and present their claims.

The fact that the decision was in effect a disallowance seems to be asserted by the petitioners on their brief, page three (3), and everywhere conceded. That such is the effect of the decision is recognized.

In re Leibowitz, 6 Am. B. R. 268.

On page 269, the court says, in a similar case:

"The referee was right in rejecting their claims be-
"cause they were not filed within one year after
"the adjudication."

The right of appeal is, in such case as this, expressly given by the Bankruptcy Act, sec. 25b, 1, 2.

"b. From any final decision of a court of appeals, al-
"lowing or rejecting a claim under this act, an appeal
"may be had under such rules and within such time as
"may be prescribed by the Supreme Court of the United
"States, in the following cases and no others:
"1. Where the amount in controversy exceeds the
"sum of two thousand dollars, and the question in-



"volved is one which might have been taken on appeal
"or writ of error from the highest court of a State to
"the Supreme Court of the United States; or
"2. Where some justice of the Supreme Court of the
"United States shall certify that in his opinion the de-
"termination of the question or questions involved in
"the allowance or rejection of such claim is essential to
"a uniform construction of this act throughout the
"United States."

As the right of appeal existed by the direct terms of the act, the determination of the Circuit Court of Appeals was not final, hence the remedy by writ of certiorari is not available to the petitioners.

Act of Congress approved March 3, 1891 (26 Stat. p. 828, tit. 13, sec. 6), limits the right to certiorari to those cases wherein the Circuit Court of Appeals is final.

In re Tampa Suburban R. Co., 168 U. S. 583, the court says:

"When sought, as between private persons, the gen-
"eral rule is that the writ of certiorari, . . . will be
"granted or denied, in the sound discretion of the court,
"on special cause shown, and will be refused where
"there is a plain and equally adequate remedy by ap-
"peal or otherwise."

## II.

## This matter is not of a character or importance warranting the intervention of this court.

It involves the allowance of claims aggregating about $8,000, and the "construction," if that term may be used, of a section of the Bankruptcy Act (57n), which is very plain and unequivocal in its terms, and which has not been, in the view suggested by counsel in the case at bar, questioned by any decision save in one inferior court, the District Court for the Southern District of New York, in the matter of Seff, an unreported uncontested case, which was virtually by consent of parties, and which was overruled by the Appellate Court of that department in the case at bar. This would not warrant the claim of counsel that the decision of this court is requisite "in order to obtain a uniformity of "construction by the courts." (Petition, Fol. 32.)

Counsel's own admission that they can find no contradecision, in point (Petition, Fol. 33; Brief, page 2) other than the overruled and unreported Seff case, concedes the present uniformity of the practice and decisions.

The case is not one that should be brought into this court.

Ex parte Lanowbew, 141 U. S. 583.

Speaking of the application of the above-mentioned act of March 3, 1891, in a case where there is no appeal, this court says:

"It is evident that it is solely questions of gravity "and importance that the circuit courts of appeal to

"certify to us for instruction; and that it is only when "such questions are involved that the power of this "court to require a case in which the judgment and de- "cree of the court of appeals is made final, to be certi- "fied, can be properly invoked."

In that case, in granting the writ, the court says:

"While therefore, this branch of our jurisdiction "should be exercised sparingly and with great caution, "we are of opinion that the grounds of this application "are sufficient to call for our interposition."

Am. Construct. Co. v. Jacksonville T. & K. W. Ry. Co., 148 U. S. 372.

If the "filing" is not, as counsel argue in one part of their brief, under Point I, an element included in "proved" as used in 57n, essential to the allowance of this claim, then it is a matter of small importance, and the action of the courts in refusing "filing" forms no obstacles to the allowance of petitioners' claim and their participation in the dividends.

In that view, this matter is not of importance and should not be brought to this court.

Counsel must take one position or the other; either "filing" is included in the construction of "proved" in 57n, in which event, the decision herein is a disallowance of a claim, and hence appealable and therefore not a subject of certiorari; or "filing" is not comprehended in the sense in which "proved" is used in 57n, and hence the petitioners are not affected by the decision, as they are not thereby precluded from proving their claims.

## III.

## "Proved," as used in 57n, contemplates and includes filing.

We must concede that "proof" is very clearly defined in the act. It is also very clear that "proof" is used in the act to designate the same thing for which "deposition" is, perhaps, more appropriately used in the general orders. (XXI.)

"Proof" is one thing; "Proved" is another thing.

"Proof" is the deposition, the verified claim; it is the instrument by which the claim is "proved."

To "prove" a claim against a bankrupt estate involves something more than verifying the deposition.

It involves action. It suggests a subject, an actor. It suggests an object against which the attack is directed. It suggests the attack; but there can be no attack until you come into the forum, and in sight of the object. In a referred case, like this, that forum is before the referee.

It is held that a proper proof of claim when presented and filed, *prima facie*, proves a claim, and the claimant, in case of a contest, has nothing more to do until the objecting party shall have put in some evidence to shake the *prima facie* case. Can there be any question that presentation and filing of the proof is an integral part of the process of "proving?"

Could it be said that a *prima facie* case was established when the "proof" had never been presented to the referee?

The suggestion that a claim is to be considered as "proved," when you have duly verified the "proof," or deposition and put it back in your pocket, or when you have put it anywhere, except before the referee, seems utterly fallacious.

"Prove" is defined, "To cause to be formally and "legally recognized as authentic and valid."

"Proof" is defined as "Anything to convince the "mind of the truth or falsity of a fact or proposition."

But does it even become "proof" until presented to the mind upon which it is intended to act?

The whole theory of presentation of claims involves, as an integral part thereof, the filing of the proof with the referee.

Such filing is by a necessary implication, which one cannot escape, a part of the *proving* of a claim.

General Order XXI (1), speaks of a *deposition* to prove "claims, etc." This deposition is used as synonymous with "proof" of debt. To be exact, that "*depo-*"*sition*" becomes "proof" when it comes regularly before the proper tribunal.

In the last two lines of the order we refer to (1) "Proofs of debt received by any trustee shall be deliv-"ered to the referee to whom the cause is referred." Here, there can be no doubt, "proof" is used in the sense of "deposition," mentioned earlier in the order. Under same rule, section 3, reference is made to *filing* with the referee, "upon the filing of satisfactory proof "of the assignment of a claim proved and entered on the "referee's docket," etc.

Shall we not infer from this that before a claim is "proved" it must have come before the *referee?*

The same order (6) says:

"When the trustee or any creditor shall desire the "re-examination of any claim filed against the bank-"rupt's estate, he may apply by petition to the referee," etc.

Does not this declare a single purpose of having the claim filed with the *referee?*

General Order XXIV says:

"The *referee* shall forthwith transmit to the clerk a "list of the claims proved against an estate."

Does not this imply their getting into court by filing with the referee?

General Order 2 says:

" . . . referee shall indorse on each paper filed "with him," etc.

General Order 20 says:

"Proofs of claims or other papers filed subsequent to "the reference, . . . may be filed either with the "referee or with the clerk."

This, by necessary implication, precludes filing elsewhere. See, also, Rules XV and XXIV, of Northern District.

Rule XV:

"General Order No. XXIV shall not be construed to "require the referee to transmit to the clerk a separate "statement of each proof of debt, but only that he shall "transmit a list of the claims proved after he has reason "to believe that all the claims have been proved against "the estate that will be presented."

Rule XXIV:

"In cases which show no assets the referee need not "formally approve or disallow any claims filed with "him, . . ."

The Act, 57b, says, of a claim on a written instrument, that "such instrument . . . shall be filed with "the proof of claim." Does not this imply a filing of the "proof" with the referee?

57c says: "Claims after being proved may, for the "purpose of allowance, be filed . . . before the "referee, if the case has been referred." This tells where claims are to be *filed.*

57d. "Claims which have been duly proved shall be "allowed, upon receipt by or upon presentation of the "court, unless, etc."

57n. "*Claims shall not be proved against a bankrupt "estate subsequent to one year after the adjudication.*"

In this section "proved" involves both steps of proof, i. e., deposition and filing.

The Act 2 (2), Speaking of jurisdiction of the court, "Allow claims, disallow claims, etc."

The Act 7 (3), of duties of bankrupt. "Examine the correctness of all proofs of claims filed against his estate."

Does not this contemplate the filing of claims before allowance?

The Act 40 (a), Of fees of referee, he is allowed, "twenty-five cents for every proof of claim filed for "allowance."

Does not this indicate the purpose of the law as to place of filing?

The Act 55 (b), "At the first meeting of creditors "the . . . referee shall preside, and before proceed-

" ing with the business, may allow or disallow the claims " of creditors there presented, etc."

Does not this contemplate the filing of the deposition or " proof " with the referee?

See, also, 55, d and e, both of which seem, by a very necessary implication, to contemplate filing of the claims.

The Act 56 (a) specifies creditors whose claims have been allowed, and this, plainly, presupposes filing.

The Act, 63 (a). " Debts of the bankrupt may be " proved and allowed against his estate, etc."

This certainly contemplates presentation or filing.

Matter of Prindle Pump Co., 10 Am. B. R. 405.

At page 407, says of 57n, that it " is more than a " limitation, that it is prohibitory and that the court has " no power or discretion to extend it. . . ."

At page 411, " the proof filed was too late."

In this case the Court says it has no discretion. It cannot consider the hardship imposed. It must follow the law.

In re Brown, 10 Am. B. R. 588.

This case clearly holds filing to be a part of the proving. " The officers of the court cannot know what " amount should be paid to a creditor, or, indeed, who " are creditors, except upon proofs of their claims in the " time and manner provided by law. . . ."

Says of 57n, " The language of the statute permits " no exceptions of its terms. . . ."

" No langauge could be more explicit, and no court " can doubt as to its meaning."

In re Thompson, 10 Am. B. R. 581.

Claim seasonably filed, withdrawal, new claim not an amendment filed after year, not allowed. (C. A., 3rd Cir.)

In re Mercur, 10 Am. B. R. 505.

You can " amend "—only when there is something shown on the record to amend.

In re Lane, 11 Am. B. R. 136.

In case of composition a claim offered for proof after the year cannot be allowed.

In re Hornstein, 10 Am. B. R. 308.

The court while dealing with " provable " vs. " allowable " does not at all deal with or consider " proved " as used in 57n.

In re Towne, 10 Am. B. R. 284.

Where, for fraud of the bankrupt, the filing of proof of claim after the year was allowed, the objector was the bankrupt, not a creditor. See page 287.

All seasonable creditors are to be paid *in full* before the late creditors can come in.

Apply that rule here and we will not object.

In re Leibowitz, 6 Am. B. R. 268.

At page 269, " Sec. 57n of the Act is controlling as " to the *time within which claims must be presented for* " *proof,* and claimants not having brought themselves " within the *time limit there prescribed must fail.* The " referee was right in rejecting their claims, because

" they were *not filed* within *one year after* the adjudica-
" tion in bankruptcy."

This would seem to settle by adjudication the very question presented at this bar.

The word " proved " in 57n is here clearly defined to be something more than swearing to a deposition. It includes filing with the referee and application for allowance.

Bray v. Cobb, 3 Am. B. R. 788.

At page 794, speaking of a claim: " If not presented " within a year, it cannot be proved or allowed."

Collier, 4th Ed., p. 394.

" Claims cannot be filed in bankruptcy after one year " after the adjudication."

In re Hawk, 8 Am. B. R. 71,

Holds that there is no jurisdiction in the court to bring in or let in a creditor after the year, who falls not within the exception contained in 57n.

Matter of Pain, 11 Am. B. R. 351, at page 357, the court says, in speaking of 57n:

" The language of the clause is plain and unequivocal. " There is no ambiguity about it and it admits of no " construction. The decisions are equally clear to the " effect that no proof of debt can be made after the ex- " piration of one year after the adjudication except in " those instances where the period is extended by the act " to not exceeding one year and six months."

In re McCollum, 11 Am. B. R. 447.

In re Muskoka Lumber Co., 11 Am. B. R. 761, *it is held that a creditor who has received no notice and*

*knew nothing of the bankruptcy adjudication is, nevertheless, barred by the year limit, and cannot prove his claim.*

It is difficult to understand how this decision is to be reconciled with the one at bar by the same judge, here deciding that the creditors who had notice, and by the negligence of their agents, which is imputable to them, failed to get their claim in within the year.

We find in this case nothing to warrant the statement made by counsel, that this claim was not scheduled.

The argument of counsel may be ingenious, but it is hardly ingenuous.

It ignores the effect of the context, the construction and use, upon the sense of the word "proved" as used in different sections.

"Proved" as used in 57b, "Claims after being "proved may," etc., has reference solely to the action of the creditor in verifying his "proof" or "deposi-"tion." *The creditor is the sole actor.*

It contemplates no action thereon, as yet, by the Court. "May" in that connection is not fairly open to the construction claimed by counsel on page 12 of brief. The act here points out the manner in which the creditor *may* get his claim properly before the court. It does not seek to compel him to get his claim in. It simply shows the way, and showing no other way, the statute is, in that sense, exclusive. The creditor "may" present his claim or not, as he choose, but if he would have it allowed, he *must* present it, as there provided, i. e., to the court or referee, and to no one else.

"Proved" as used in 57n is more comprehensive than in 57c. *It clearly contemplates the court as an actor.*

It has reference to something in which the court is an actor. And the statute places its prohibition upon the action of the court.

Counsel's construction asks us to understand that Congress has here, in 57n simply prohibited the creditor, in the seclusion of his own office, from signing a "proof" of claim after the expiration of the year, something with which neither Congress nor the court has any concern. Something which would be an unconstitutional infringement of the rights of the American citizen.

It asks us to understand that " proved " here has no reference to the action of the courts, whose power and duties Congress has the right and power to prescribe.

The statement of their proposition seems to illustrate its absurdity and carry with it, its own refutation.

In the case cited by counsel for the petitioners.

Hutchinson v. Oris, 190 U. S. 552.

Permission to file amended " proof " in that case was placed upon the peculiar facts of that case and the contract of the interested parties. It was an amendment, not a new proof. The claim was the same.

The court says:

" The clause relied upon cannot be taken to exclude " amendments."

This cited case is in no wise at variance with the determination in the case at bar.

## IV.

### The trustee has no duty to perform in respect to the filing of claims.

There is no provision anywhere in the Act for filing claim with anyone save the referee, in referred cases. (We are not here considering filing with clerk.)

The provision for presentation, consideration and allowance of claims to and by the referee are clear and mandatory.

It is made his province and his duty.

Now, in the face of all the mandatory provisions of the law and general orders and district rules; in the face of what, from years of experience, the law is understood to be, can it be held that, by reason of the last sentence of General Order XXI (1), which directs the trustee to deliver any "proofs" to the referee, that a claim can be proved before the trustee as well as before the referee? That is what must be held to sustain the decision here. This is not a question of fact. It is a question of law, a question to be met and decided, without reference to individual hardship.

If such is the law in this case, it must be the law in every case. If delivery to the *trustee* is a sufficient "proving" of a claim, how can a *referee* know when the claims are all proved? If the trustee has these co-ordinate powers what opportunity is there to present seasonable objection to claims?

The mere statement of the logical result of such ruling would seem to be a sufficiently clear demonstration of its absurdity.

Upon the flimsy excuse of an agent's forgetfulness shall the mandate of the law be nullified? Shall it become true that a creditor who has been diligent, who has

complied with the law, can acquire no rights which must be respected?

If the practice heretofore has been correct; if the law means what it says; if we are to be in any manner bound by the decision in 6 Am. B. R. 268, quoted above, all the argument about the hardship to these delaying creditors is irrelevant.

They had their chance; if they missed it, the fault was with them. If the law is thought here to be a hardship that does not give a court power to revise the law. It is for the courts to apply the law, not to create a statute.

The argument of counsel consists mainly of conceits upon the provisions of General Order XXI (1), last sentence.

In so far as it may seem to contemplate a "filing" with the trustee it is confessedly at variance with the act. Need we say more?

The enacting power lies with Congress, not with the Supreme Court. The act must prevail, and where at variance with the act the general orders are not to be considered.

Collier, 4th Ed., p. 286.

"But the general orders are not always in tune with "the law; . . . In such cases, the law, of course, "controls; our general orders and forms have not the "effect of law, *much less of the abrogation of law.*"

West v. Lea, 2 Am. B. R. 463.

This court says of its own rules on page 470: "These "rules were but intended to execute the act, and not to "add to its provisions."

All this talk of these creditors suffering injustice is fallacious.

If there was any duty imposed upon trustee or attorney by this delivery of claims, then there was a default in the execution of a duty, for which they can answer. If there was no duty imposed, then the creditors have done nothing to entitle them to any consideration, even from an equitable standpoint.

Mr. Smith was the agent, voluntary or otherwise, of the petitioners to file these claims.

The rights and remedies available as between the petitioners and their agents are not matters within the cognizance of this court at this time. This proposition, however, is in point, that what the petitioners did or failed to do through their acknowledged agents is imputable here in this court to the petitioners.

There is no suggestion in the record that Mr. Smith or his clerk is not abundantly able to indemnify the petitioners if they have suffered any loss. There is then no ground disclosed by the record, upon which to urge, on behalf of the petitioners, equities that should override the mandatory provisions of the statute.

There is, however, a very strong suggestion running through petition and arguments, that this application is made in the interest and for the benefit of Mr. Smith, who is not a party to the record.

In the absence from the record of any such finding of fact, we cannot presume that petitioners acted at any time in reliance upon General Order XXI (1), and the second efficient cause referred to by counsel, on page 19 of their brief, is eliminated, and the willful or negligent acts and omissions of Mr. Smith and his clerk remain the only efficient factors in the situation.

New findings of fact cannot be made here. Counsel base their argument on the equities of the petitioners

upon the proposition that they delivered their "proofs" to the trustee in reliance upon General Order XXI (1). There is no such finding. There is no suggestion that such was the fact, anywhere, save in the argument of counsel. If petitioners would seek relief on the ground that they were misled by the rule of the court, it was certainly incumbent upon them to aver and prove such fact, which they have not done.

Nor is that argument available to the claim of Mr. Duncan, who is trustee, unless he can comply with petitioners' interpretation of the statute by presenting his claim to himself, which is again an absurdity.

Moreover this application is an entity. It is not made by the petitioners severally, and if it cannot be properly granted as to all, it must fail.

Nor can counsel fairly claim that accident and negligence on the part of Mr. Smith's clerk were the only efficient cause of the non-filing. It is found as a fact (fol. 6, 10th finding), "That said Henry W. Smith for "a time after said claims were so left with him for "filing by the trustee upon his own responsibility de-"layed filing the same with the referee."

The Court is asked to cut down by one-half the dividends of those creditors who have complied with the law. Is there any apparently good reason for doing this?

We may reach a better understanding of the presence of this provision as to trustees in General Order XXI (1), if we look into its history.

The Act of 1898, section 30, reads: "All neces-ary "rules, forms, and orders as to procedure and for carry-"ing this act into force and effect shall be prescribed, "and may be amended from time to time by the Su-"preme Court of the United States."

This is the only authority for the existence of the general orders. *That gives no power to create either new officers or new duties for existing officers.*

We understand that the present general orders are an adaptation from the practice existing under the Act of 1867.

The Act of 1867 provides, in section 22, that proofs of claims should be first presented to the *register,* who after approving the same, was required to send them to the *assignee,* whose duty it was to compare them with the books of the bankrupt, and enter them in a register to be kept by him, *and then* deliver all proofs of claims received by him to the *register.* General Orders 34, under Act of 1867, and the language of the old rule is identical with that of present rule XXI (1), in this respect, only reading "trustee" for "assignee," and "referee" for "register."

Under that Act of 1867, section 10, the justices of the Supreme Court were empowered to frame general orders for the purpose, among other things, for regulating the duties of the various officers; for regulating the filing, custody and inspection of papers, and to consolidate the duties of register, assignee, etc.

By reference to these provisions it is seen that not only were the powers given to the Supreme Court much broader than under the Act of 1898, but the Act of 1867, made a provision for proofs of claims coming into the hands of the assignee, and imposed a duty upon him in reference to the proofs of claim, which the Act of 1898 does not impose.

And the anomalous provisions in reference to the trustee delivering claims to the referee, contained in General Order XXI (1), are now inapplicable remnants of a provision that, under the Act of 1867, was consistent with the duties imposed by that act.

In this connection there is another consideration that is suggested by this application.

Mr. Charles Duncan, as trustee, is one of the petitioners. He is the trustee for the benefit of the creditors. It occurs to us that the proper discharge of his duty to those whose claims have been allowed does not either require or permit him to join in the effort to get in other claims.

No relief has been sought or recovered in any stage of this proceeding against the trustee. We suggest that the trustee has no standing to apply for the writ of certiorari.

## The decision of the Circuit Court of Appeals was correct.

This application for a writ of certiorari should be denied.

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